

COMMONWEALTH OF KENTUCKY
FLOYD CIRCUIT COURT, DIV. 1
CIVIL ACTION NO. 18-CI-00167

FILED
THIS 1 DAY OF April 20 19
TENDERED
BY: DOUGLAS R. HALL, CLERK
ENTERED RECEIVED
K. Horn

COMMONWEALTH OF KENTUCKY, ex. rel.
ANDY BESHEAR, ATTORNEY GENERAL,

PLAINTIFF

v.

AMERISOURCEBERGEN DRUG CORPORATION,
H.D. SMITH WHOLESALE DRUG COMPANY, and
H.D. SMITH, LLC

DEFENDANTS

ORDER DENYING MOTION TO DISMISS

This matter is before the Court on a motion by Defendant, AmerisourceBergen Drug Corporation, to dismiss the Commonwealth's Complaint for failure to state a claim. The Court, having reviewed the parties' briefs and conducted a hearing on the matter, hereby rules as follows:

With regard to the Motion to Dismiss for Failure to State a Claim, the Motion is DENIED as to all claims except Count II, Public Nuisance, which is held in ABEYANCE. The Court further holds:

All claims are sufficiently pled. The free public service doctrine is not a bar to any of the claims in this matter as it has not been adopted in Kentucky.

As to Negligence and Negligence Per Se, the Commonwealth has adequately pled Kentucky statutory and regulatory duty, which incorporates obligations under federal law into Kentucky law. The Commonwealth has further adequately pled proximate cause.

As to the Consumer Protection Act ("KCPA"), the Commonwealth has adequately pled a violation of the Act, which does not require an independent duty. The Court finds this claim is

adequately pled under Civil Rule 8.02. The Commonwealth has further adequately pled a claim for monetary damage under the Act in addition to its claims for injunction and penalties. The Court finds it is not an element of the KCPA that defendant's acts be "consumer-directed" and the Commonwealth has adequately pled that AmerisourceBergen was acting in the conduct of trade or commerce under the Act. Finally, the Court finds proximate cause is not applicable to an Attorney General claim under the KCPA.

As to common law fraud, the Commonwealth has adequately pled its claim under Civil Rule 9.01. The Commonwealth has adequately pled a duty under Kentucky law.

As to Medicaid Fraud, the Court finds the Attorney General has authority to bring the claim in this matter. Further, the Commonwealth has adequately pled a claim against AmerisourceBergen as a "person" covered by the Act, and that AmerisourceBergen Drug Corporation, "caused" false claims to be submitted to the Kentucky Medicaid program. The Commonwealth has adequately pled the AmerisourceBergen received payment through the Medicaid program. The Commonwealth has also adequately pled that Defendant proximately caused the harm at issue under this claim.

As to unjust enrichment, the Commonwealth has adequately pled that it conferred a benefit upon defendant.


As to Fraud by Omission, the Commonwealth has adequately pled a duty under Kentucky law. The Commonwealth has also adequately pled that Defendant proximately caused the harm at issue under this claim.

As to Public Nuisance, the Court holds the issue in abeyance as unripe pending completion of discovery.

Defendant AmerisourceBergen Drug Corporation shall have 30 days from the date of entry of the order to answer or otherwise plead.

IT IS SO ORDERED.

ENTERED this 1 day of ~~March~~ ^{April}, 2019.



JUDGE, FLOYD CIRCUIT COURT
DATE: April 1, 2019

TENDERED BY:

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